

Senate Bill No. 1026

CHAPTER 1

An act to add and repeal Article 6.9 (commencing with Section 20209.20) of Chapter 1 of Part 3 of Division 2 of the Public Contract Code, relating to public contracts.

[Approved by Governor January 13, 2006. Filed with
Secretary of State January 13, 2006.]

LEGISLATIVE COUNSEL'S DIGEST

SB 1026, Kuehl. Highway construction contracts: design-build projects.

Existing law makes the Department of Transportation responsible for improving and maintaining the state highway system. Under existing law, until January 1, 2010, the department is authorized to utilize design sequencing as an alternative contracting method for the design and construction of not more than 12 transportation projects.

This bill would authorize the Los Angeles County Metropolitan Transportation Authority, until January 1, 2010, in consultation with the department, to use a specified design-build procurement process for the construction of a high-occupancy vehicle lane in the County of Los Angeles designated in the National Corridor Infrastructure Improvement Program, the federal "Safe, Accountable, Flexible, Efficient Transportation Equity Act," if certain conditions are satisfied.

This bill would require design-build entity bidders to provide certain information in a questionnaire submitted to the authority that is verified under oath. Because a verification under oath is made under penalty of perjury, the bill would create a new crime and impose a state-mandated local program. After a contract is awarded, the bill would require the authority to report to a specified committee of the Legislature regarding implementation of the design-build process.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

The people of the State of California do enact as follows:

SECTION 1. Article 6.9 (commencing with Section 20209.20) is added to Chapter 1 of Part 3 of Division 2 of the Public Contract Code, to read:

Article 6.9. Transportation Design-Build Contracts

20209.20. The Legislature finds and declares all of the following:

This project is subject to the existing process under the state transportation improvement program (Chapter 2 (commencing with Section 14520) of Part 5.3 of Division 3 of the Government Code) or the traffic congestion relief program (Chapter 4.5 (commencing with Section 14556) of Part 5.3 of Division 3 of the Government Code), as applicable, for planning, programming, environmental clearance, and funding. The project must comply with all existing requirements under the state transportation improvement program or the traffic congestion relief program, as applicable, for project development and funding. This article shall not confer any type of competitive advantage upon the project in this article, relative to other projects subject to the state transportation improvement program, during other phases of project development.

20209.22. For the purposes of this article, the following definitions apply:

(a) “Authority” means the Los Angeles County Metropolitan Transportation Authority.

(b) “Department” means the Department of Transportation.

(c) “Design-build” means a procurement process in which both the design and construction of a project are procured from a single entity.

(d) “Design-build entity” means a partnership, corporation, or other legal entity that is able to provide appropriately licensed contracting, architectural, and engineering services as needed pursuant to a design-build contract.

(e) “Project” means the construction of a high-occupancy vehicle lane in the County of Los Angeles designated in the National Corridor Infrastructure Improvement Program as established in Section 1302 of HR 3, the federal “Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users,” signed into law by the President on August 10, 2005.

20209.23. The authority may utilize the design-build procurement method for the construction of a high-occupancy vehicle lane in the County of Los Angeles designated in the National Corridor Infrastructure Improvement Program as established in Section 1302 of HR 3, the federal “Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users,” signed into law by the President on August 10, 2005.

20209.24. The authority shall implement a labor compliance program as described in Section 1771.5 of the Labor Code, or it shall contract with a third party to implement on the authority’s behalf a labor compliance program subject to that statute. This requirement does not apply to any project where the authority or the design-build entity has entered into any collective bargaining agreement or agreements that bind all of the contractors performing work on the projects.

20209.26. Bidding for the project shall progress as follows:

(a) (1) The authority, with the approval of the department, shall prepare or cause to be prepared, a set of documents setting forth the scope of the project, as set forth in this subdivision.

(2) The department shall prepare documents that may include, but need not be limited to, the size, type, and desired design character of the project, performance specifications covering the quality of materials, equipment, and workmanship, preliminary plans, and any other information deemed necessary to describe adequately the authority's needs. The performance specifications and any plans, preliminary engineering, environmental documents, prebid services, and project reports shall be performed by employees of the department. The preliminary engineering and project reports shall be performed by professional engineers employed by the department.

(b) Based on the documents prepared under subdivision (a), the authority shall prepare a request for qualifications that invites interested parties to submit qualifications in the manner prescribed by the authority. The request for qualifications shall include, but need not be limited to, the following elements:

(1) Identification of the basic scope and needs of the project or contract, the expected cost range, the methodology that will be used by the authority to evaluate qualifications, the process for selecting from among prequalified parties the lowest responsible bidder, and any other information deemed necessary by the authority to inform interested parties of the contracting opportunity.

(2) Significant factors that the authority shall consider in evaluating qualifications, including cost or price lifecycle costs over 15 years or more, technical design and construction expertise, skilled labor force availability, and all other nonprice related factors. As used in this paragraph, "skilled labor force availability" shall be determined by the existence of an agreement with a registered apprenticeship program, approved by the California Apprenticeship Council, that has graduated at least one apprentice in each of the preceding five years. This graduation requirement shall not apply to programs providing apprenticeship training for any craft that was first deemed by the Department of Labor and the Department of Industrial Relations to be an apprenticeable craft within the five years prior to the effective date of this article.

(3) The relative importance of the weight assigned to each of the factors identified in the request for qualifications.

(4) If the authority reserves the right to hold discussions with prequalified bidders, it shall so specify in the request for qualifications and shall publish separately or incorporate into the request for qualifications applicable rules and procedures to be observed by the authority to ensure that any discussions or negotiations are conducted in good faith.

(c) (1) In establishing the procedure to prequalify design-build entities, the authority shall use a standard questionnaire prepared by the authority. In preparing the questionnaire, the authority shall consult with the construction industry, including, but not limited to, representatives of the

building trades and surety industry. This questionnaire shall require information including, but not limited to, all of the following:

(A) If the design-build entity is a partnership, limited partnership, or other association, a listing of all of the partners, general partners, or association members known at the time of bid submission who will participate in the design-build contract.

(B) (i) Evidence that the lead member of the design-build entity has completed a state highway project in California with a value of at least twenty-five million dollars (\$25,000,000) in the past 10 years.

(ii) Evidence that the members of the design-build entity have completed, or demonstrated the experience, competency, capability, and capacity to complete projects of similar size, scope, or complexity, and that proposed key personnel have sufficient experience and training to competently manage and complete the design and construction of the project, as well as a financial statement that assures the authority that the design-build entity has the capacity to complete the project.

(C) The licenses, registration, and credentials required to design and construct the project, including, but not limited to, information on the revocation or suspension of any license, credential, or registration.

(D) Evidence that establishes that the design-build entity has the capacity to obtain all required payment and performance bonding, liability insurance, and errors and omissions insurance.

(E) Information concerning workers' compensation experience history and a worker safety program.

(F) A full disclosure regarding all of the following that are applicable:

(i) Any serious or willful violation of Part 1 (commencing with Section 6300) of Division 5 of the Labor Code or the federal Occupational Safety and Health Act of 1970 (Public Law 91-596), settled against any member of the design-build entity.

(ii) Any debarment, disqualification, or removal from a federal, state, or local government public works project.

(iii) Any instance where the design-build entity, or its owners, officers, or managing employees submitted a bid on a public works project and were found to be nonresponsive, or were found by an awarding body not to be a responsible bidder.

(iv) Any instance where the design-build entity, or its owners, officers, or managing employees defaulted on a construction contract.

(v) Any violations of the Contractors' State License Law, as described in Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code, excluding alleged violations of federal or state law regarding the payment of wages, benefits, apprenticeship requirements, or personal income tax withholding, or Federal Insurance Contribution Act (FICA) withholding requirements settled against any member of the design-build entity.

(vi) Any bankruptcy or receivership of any member of the design-build entity, including, but not limited to, information concerning any work completed by a surety.

(vii) Any settled adverse claims, disputes, or lawsuits between the owner of a public works project and any member of the design-build entity during the five years preceding submission of a bid under this article, in which the claim, settlement, or judgment exceeds fifty thousand dollars (\$50,000). Information shall also be provided concerning any work completed by a surety during this period.

(G) In the case of a partnership or any association that is not a legal entity, a copy of the agreement creating the partnership or association and specifying that all partners or association members agree to be fully liable for the performance under the design-build contract.

(H) Information regarding the safety record of the design-build entity. A bidder's safety record shall be deemed acceptable if its experience modification rate for the most recent three-year period is an average of 1.00 or less, and its average total recordable injury/illness rate and average lost work rate for the most recent three-year period does not exceed the applicable statistical standards for its business category or if the bidder is a party to an alternative dispute resolution system as provided for in Section 3201.5 of the Labor Code.

(2) The information required under this subdivision shall be verified under oath by the entity and its members in the manner in which civil pleadings in civil actions are verified. Information required under this subdivision that is not a public record under the California Public Records Act, as described in Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 of the Government Code, shall not be open to public inspection.

(d) The authority shall establish a procedure for final selection of the design-build entity in which selection shall be based upon a competitive bidding process resulting in lump-sum bids by the prequalified design-build entities. Awards shall be made to the lowest responsible bidder.

(e) (1) Notwithstanding any other provision of this code, upon issuance of a contract award, the authority shall publicly announce the award, identifying the contractor to whom the award is made, along with a written decision supporting the contract award and stating the basis of the award. The notice of award shall also include all prequalified design-build entities.

(2) The written decision supporting the authority's contract award, described in paragraph (1), and the contract file shall provide sufficient information to satisfy an external audit.

20209.27. For purposes of this article, prebid services include preliminary engineering studies and other activities that lead to the selection of a project alternative. These activities encompass a variety of tasks, including, but not limited to, the following activities:

- (a) Project geometric design.
- (b) Earthwork calculations.
- (c) Preparation of cross sections.
- (d) Drainage design.

(e) Construction staging design.

20209.28. (a) Any design-build entity that is selected to design and build the project under this article shall possess or obtain sufficient bonding to cover the contract amount for nondesign services, and errors and omission insurance coverage sufficient to cover all design, engineering, and architectural services provided in the contract. This section does not prohibit a general or engineering contractor from being designated the lead entity on a design-build project for the purposes of purchasing necessary bonding to cover the activities of the design-build entity.

(b) Any payment or performance bond written for the purposes of this article shall be written using a bond form developed by the Department of General Services under subdivision (i) of Section 14661 of the Government Code.

20209.30. All bids by subcontractors that were not listed by the design-build entity in accordance with subparagraph (A) of paragraph (1) of subdivision (c) of Section 20209.26 shall be considered by the design-build entity in accordance with the design-build process set forth by the authority in the design-build package. All bids by subcontractors bidding on contracts under this article shall be subject to Chapter 4 (commencing with Section 4100) of Part 1 of Division 2. The design-build entity shall do both of the following:

(a) Provide public notice of the availability of work to be subcontracted in accordance with the publication requirements applicable to the competitive bidding process of the authority.

(b) Provide a fixed date and time on which the subcontracted work will be awarded in accordance with the procedure established under this article.

20209.32. (a) A deviation from the performance criteria and standards established under subdivision (a) of Section 20209.26 may not be authorized except by written consent of the authority and the department.

(b) The employees of the department shall perform the construction inspection for the project constructed under this article, including surveying and testing the materials for the project. All design related documents shall be public records.

20209.34. Quality control inspection for the construction of the project utilizing the design-build approach authorized by this article shall be performed by employees of the department.

20209.36. Nothing in this article affects, expands, alters, or limits any rights or remedies otherwise available at law.

20209.38. (a) The retention proceeds withheld by the authority from a design-build entity shall not exceed 5 percent.

(b) The authority shall not withhold retention from payments to a design-build entity for actual costs incurred and billed or design services, construction management services, or where applicable, for completed operations and maintenance services.

(c) In a contract between a design-build entity and a subcontractor, and in a contract between a subcontractor and any subcontractor thereunder,

the percentage of the retention proceeds withheld may not exceed the percentage specified in the contract between the authority and the design-build entity. If the design-build entity provides written notice to any subcontractor who is not a member of the design-build entity, prior to or at the time that the bid is requested, that a bond may be required and the subcontractor subsequently is unable or refuses to furnish a bond to the design-build entity, then the design-build entity may withhold retention proceeds in excess of the percentage specified in the contract between the authority and the design-build entity from any payment made by the design-build entity to the subcontractor.

(d) In accordance with the provisions of applicable state law, the design-build entity may be permitted to substitute securities in lieu of the withholding from progress payments specified in subdivision (b). Substitutions shall be made in accordance with Section 22300.

20209.40. Not later than three years after a design-build contract is awarded, the authority shall submit a progress report to the Senate Committee on Transportation and Housing and the Assembly Committee on Transportation. The progress report shall include, but shall not be limited to, all of the following information:

- (a) A description of the project.
- (b) The estimated and actual project costs.
- (c) The design-build entity that was awarded the project.
- (d) A description of any written protests concerning any aspect of the solicitation, bid, proposal, or award of the design-build project, including, but not limited to, the resolution of the protests.
- (e) An assessment of the prequalification process and criteria and a copy of the prequalification questionnaire.
- (f) An assessment of the impact of limiting retention to 5 percent on the project, as required under Section 20209.38.
- (g) A description of the labor force compliance program required under Section 20209.24, and an assessment of the impact on the project where compliance with that program is required.
- (h) A description of the method used to award the contract.
- (i) An assessment of the project impact of the “skilled labor force availability” requirement imposed under paragraph (2) of subdivision (b) of Section 20209.26.
- (j) Recommendations regarding the most appropriate uses for the design-build approach.

20209.44. This article shall remain in effect only until January 1, 2010, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2010, deletes or extends that date.

SEC. 2. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs that may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the

definition of a crime within the meaning of Section 6 of Article XII B of the California Constitution.

SEC. 3. The provisions of this act are severable. If any provision of this act or application of the provisions of this act is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.